Testimony of

# Mr. John Schmidt

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STATEMENT OF FORMER ASSOCIATE ATTORNEY GENERAL JOHN SCHMIDT
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My name is John Schmidt. I am now a partner in the law firm of Mayer, Brown, Rowe & Maw in Chicago. From 1994 to 1997, I served as the Associate Attorney General of the United States in the Justice Department under President Bill Clinton. Prior to going to the Justice Department I served from 1993 to 1994 as Ambassador and Chief United States Negotiator to the Uruguay Round under the General Agreement on Tariffs & Trade.

I have a long history of active support for Democrats for local and national office, including serving as the first Chief of Staff for Mayor Richard M. Daley in Chicago and leadership positions in campaigns of Paul Simon, Adlai Stevenson, Barack Obama and others.

The question we should ask about possible changes in the Foreign Intelligence Surveillance Act is not who "wins" or "loses" between Congress and the President, as though the separation of powers were a sporting event between the branches. The question is what institutional structure will both protect our constitutional rights and achieve effective surveillance of A1 Qaeda and other terrorist groups. Passage of the bill drafted by Senator Specter would be a constructive step toward both of these objectives.

The Specter bill would allow the President to submit to the Foreign Intelligence Surveillance Court for review of its constitutionality a program for electronic surveillance of terrorist groups that does not involve FISA court approval of individualized warrants identifying the specific surveillance targets. The President cannot do that under current law. The FISA court has been explicit that it is a court of limited statutory jurisdiction; for example, the court refused some years ago to consider an application for approval of a physical search to obtain foreign intelligence at a time when the statute was limited to the approval of electronic surveillance.

The surveillance program that President Bush authorized the National Security Agency to undertake after 9/11 involves decisions by NSA professionals in a 'real time' process that President Bush, General Hayden and others have all said could not be reconciled with the FISA statutory requirement for individualized approval of warrants. Based on everything we know about it, the NSA program nevertheless appears to most observers to be protective of constitutional rights, in light of the critical importance of the information to be obtained, in a way that would satisfy the requirement of reasonableness under the Fourth Amendment.

Outside observers, however, cannot know the specifics of what is, by its nature, a secret surveillance program. And outside observers do not have the institutional capacity and independence of federal judges in making constitutional judgments.

A federal court determination of the constitutionality of the NSA program, which the Specter bill allows, would be good for everyone---for the President, Congress, NSA security professionals and the American people.*
It would be good for the President to find out whether a federal court agrees that the NSA program is constitutional. Such a judgment would allow the President to make changes if necessary to satisfy constitutional standards.

It would be good for Congress for a federal court to make that constitutional judgment. Congress lacks the institutional capacity to make a constitutional judgment of this nature. As a political branch, its members are susceptible, in appearance if not in fact, to the partisan pressures of subservience, by members of the President's party, or hostility, by members of the opposition. While Congress may make broad constitutional judgments in legislating, it has no mechanism for making judgments that require assessment of the details of a particular program. Congressional oversight, while it should continue, is misused when it is asked to bear the weight of such constitutional judgments.

It would be good for security professionals at the NSA and elsewhere to be given the confidence of a federal court judgment on the constitutionality of their actions. There is no reason to think the current NSA program is the last word when it comes to electronic surveillance of terrorist groups. We want the smartest and most creative people at the NSA and elsewhere in government working with the best communications professionals in the private sector to develop new and better surveillance methods than any we can currently imagine. Creative and aggressive efforts of this kind must be inhibited today by the prospect than any changes in the current program, or wholly new surveillance programs, will face confrontation and dispute over their legality. A procedure for court review, in contrast, allows security professionals to know that the constitutionality of future programs can be reviewed by a court before they are put into effect.

Finally, a federal court judgment on the constitutionality of a surveillance program would be good for the American people. Federal courts are far and away our most trusted institutional means to make constitutional judgments. Such a judgment will increase the confidence of all of us that our constitutional rights are being protected.

The Specter bill also contains an acknowledgement of the President's Article II authority as commander-in-chief, outside the statute, to order warrantless electronic surveillance of a foreign enemy that has attacked this country. This provision is consistent with judicial authority. Three federal Court of Appeals decisions have held that the President has power under Article II to order warrantless wiretapping for foreign intelligence purposes. The only judicial decision that deals with Congressional authority in the surveillance area says flatly that "Congress could not encroach on the President's constitutional power."* Thus, by including this recognition, Congress is simply acknowledging what the courts have said.

But even if Congress could constitutionally limit the President's surveillance authority to a specified statutory process, Congress should not want to do that. Edward Levi, the great Attorney General under President Ford who played a critical role in the development of the FISA statute, repeatedly said that it would be "dangerous" for Congress to enact a statute that did not explicitly acknowledge the President's Article II surveillance power. Although Levi was prepared to say that President Ford would use the FISA statutory process in all circumstances he could then

anticipate, he emphasized that future foreign threats to this country were unpredictable and communications technologies could change in ways that made the statutory process inadequate to those future threats.

If there was any previous doubt, the events of 9/11 proved Levi unmistakably correct. No one anticipated a massive terrorist attack here in the United States creating a need for surveillance in this country on where and when that terrorist group might attack next. When the NSA told the President that it could potentially obtain information on such a future attack using surveillance technologies that were inconsistent with the requirements of the FISA statutory process, the President had to rely on his Article I1 power or deny us the added protection from that surveillance.

If those who assert that the FISA statutory process is "exclusive" were correct, then if General Hayden had called President Bush on the morning of 9/11 and said that the NSA wanted to go forward immediately with intercepts of calls at other airports where Al Qaeda was believed to be planning further attacks, the President's only lawful response would have been to tell the NSA to get in touch with the Attorney General and begin examining whether each of the proposed intercepts satisfied the FISA standard, with the prospect of obtaining authorization many hours, if not days, later. That is not the way any American President would understand his constitutional authority- and I do myself believe any court would reach that result.

One can debate the extent of the President's constitutional power to carry out surveillance on a foreign enemy outside the confines of a statute, but there can be no serious doubt that in some circumstances such power exists. The provision in the Specter bill does not purport to define the extent of the President's Article I1 power, but only to acknowledge its existence.

I would change the bill's procedures for judicial review of a terrorist surveillance program in three respects:
1. A surveillance program is more appropriately submitted for review directly to the Foreign Intelligence Surveillance Court of Review, consisting of 3 federal Court of Appeals Judges, instead of to the Foreign Intelligence Surveillance Court, which consists of District Court judges. Under the current bill, the constitutionality of a program would reach the appellate court level only if the lower court denied approval and the government appealed.
2. The statute should provide that the Court of Review will make public its decision on any surveillance program to the extent it can do so without compromising the secrecy of the program. While I believe the Court would take such action anyway, as it did when it made public its opinion on the required "wall" procedures after passage of the Patriot Act, it would be desirable to provide assurance to that effect.
3. The statute should direct the Court of Review to submit copies of any opinion on the legality of a surveillance program to the Supreme Court and allow the Supreme Court to review the decision on a writ of certiorari if it chooses to do so. This would provide assurance that decisions are consistent with the Supreme Court's view of constitutional requirements.

I would also eliminate the provision of that bill that describes the specific nature of the communications that a surveillance program must target and instead simply require the court to determine that a program is consistent with the Constitution. While the more specific provisions seem reasonable and may fit the current NSA program, the statute is most likely to serve its

purpose if the court has maximum flexibility to apply the Constitution to what may be wholly unanticipated future circumstances.

Congress and the President have the opportunity to get beyond the current confrontation over the NSA program and create an institutional mechanism that can avoid similar controversies in the future. Constitutional protection and terrorist surveillance will both be advanced by passage of the Specter bill.